U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 16, 1998
Case No.: 1996-INA-00218

In the Matter of:

FREE BIRD, INC.,
Employer

On Behalf Of:

SEOK J. PARK,
Alien

Certifying Officer Paul R. Nelson, Region IX
Appearance: Roger J. Gleckman, Esq.
For the Employer/Alien
Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 16, 1993, Free Bird, Inc. ("Employer") filed an application for labor certification to enable Seok Jo Park ("Alien") to fill the position of Sample Maker (AF 36-37). The job duties for the position are:

> Follow designer sketches and specifications to prepare sample garments. Follow patterns to cut and sew sample garments. Select appropriate fabric, trim, thread and accessories. Follow patterns to cut and sew different styles of children's bedding and linens, including quilts, pillows, sheets coverings for high chairs and other seasts [sic], etc. Use the following machines: Multi-needle machines overlock, double needle and single needle. Use the following fabrics: cotton, cordoroy [sic], polyester, wool, etc.

The requirements for the position are six years of grade school and two years of experience in the job offered.

The CO issued a Notice of Findings on January 19, 1995 (AF 29-34), proposing to deny certification on several grounds. First, the CO questioned whether the job opportunity is clearly open to qualified U.S. workers pursuant to § 656.20(c)(8). In addition, the CO questioned whether there is actually a permanent, full-time job opening in accordance with § 656.3. Finally, the CO found that the Employer failed to advertise the job opportunity in the appropriate publication. Therefore, the CO instructed the Employer to readvertise the job opportunity.

Accordingly, the Employer was notified that it had until February 23, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated February 14, 1995 (AF 11-28), the Employer submitted documentation indicating that there is no employment relationship between the Employer and the Alien and, therefore, the job opportunity is clearly open to U.S. workers. The Employer further stated that, of the past 10 Sample Makers hired via the labor certification process, only two have left. Finally, the Employer argued that its advertisement complied with the regulations and, therefore, it should not be required to readvertise the job opportunity.

The CO issued the Final Determination on April 11, 1995 (AF 6-10), denying certification because the Employer failed to comply with the CO's instructions to readvertise the job opportunity.

Discussion

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Section 656.21(g) states the following:

> In conjunction with the recruitment efforts under paragraph (f) of this section, the employer shall place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified and available U.S. worker. . . ..

In accordance with this regulation, the CO, in the NOF, informed the Employer that it should have advertised the job opportunity in the Los Angeles Times (City Edition) as opposed to the Long Beach Press-Telegram (AF 31). The CO explained that the L.A. Times has a larger circulation throughout the area of intended employment and it specifically seeks workers in the garment industry. Accordingly, the CO instructed the Employer to readvertise the job opportunity in the L.A. Times.

In rebuttal, the Employer argued that the California Employment Development Department gave it an option of advertising either in the Long Beach Press-Telegram or the L.A. Times and, therefore, it is in full compliance with the regulations (AF 13). The Employer further argued that the CO failed to set forth any reasonable grounds for readvertisement and, as such, the Employer is under no duty to readvertise (AF 14). The Employer attached an affidavit from an individual employed at the Los Angeles Times stating that, at the time of the original advertisement, the Employer's advertisement would have been placed under the heading of "Sample Maker" and not garment industry as the CO stated (AF 19). In addition, the Employer stated that identical applications were previously approved by the CO. Finally, the Employer offered to readvertise the job opportunity in the L.A. Times if the CO did not accept its rebuttal arguments (AF 15).

Initially, we note that the CO has the authority for determining the adequacy of an employer's recruitment efforts and is authorized to require further recruitment if he or she finds that such recruitment could produce additional qualified job applicants. *Essex County College*, 88-INA-147 (Feb. 1, 1989) (*en banc)*; § 656.24(b)(2)(i) and (iii). Furthermore, nothing in the regulations binds the CO to any statements or actions by the local job service. However, where the CO requires advertising different from or in addition to that which the employer has run, the CO must provide a reasonable explanation of why the employer's advertising and recruitment efforts were inadequate and show how the additional recruitment efforts would add to the test of the labor market. See *Intel Corp.,* 87-INA-570 (Dec. 11, 1987) (*en banc)*; *Pater Noster High School*, 88-INA-131 (Oct. 17, 1988).

In this case, we find that the CO has provided a reasonable explanation of why the Employer's advertising was inadequate and why the recommended recruitment procedures will add to the test. As discussed above, the CO clearly stated that the L.A. Times has a larger circulation throughout the area of intended employment. In addition, the CO stated that the L.A.

Times has a section specifically dedicated to the garment industry.[2] Therefore, we find that the CO's determination regarding the Employer's advertisement was appropriate in this case.[3]

We do not agree, however, with the CO's decision to deny certification based on the Employer's failure to readvertise, as an employer's offer to cure a defect may be conditioned on a finding that its rebuttal evidence is not persuasive. See *A. Smile, Inc.*, 89-INA-1 (Mar. 6, 1990)[4]. In this case, the Employer responded to the NOF within the time allotted for rebuttal, asserting that it believed it had complied with the requirements of § 656.21(g) (AF 13-15). However, the Employer further stated that it would readvertise the job opportunity (AF 15). Nonetheless, the CO denied certification due to the Employer's failure to readvertise the job opportunity (AF 7-8).

Thus, the CO should have allowed the Employer an opportunity to readvertise the job opportunity in the L.A. Times. See, e.g., *A. Smile, supra; Magnesium Alloy Products*, 90-INA-174 (Mar. 27, 1991). The Employer was in the situation of timely attempting to justify the sufficiency of the ad location, while specifying that he was willing to readvertise. Since there would have been no need to readvertise if the CO had accepted the Employer's justification and since the Employer could not know whether his justification was acceptable until the CO considered his rebuttal, fairness demands that the CO should have granted the Employer's request to readvertise the job opportunity. Accordingly, this case will be remanded so that the Employer may readvertise the job opportunity in the L.A. Times.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

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[2] In rebuttal, the Employer argued that, at the time of the original advertisement, the L.A. Times did not have a section specifically designated to the garment industry (AF 14). However, the CO instructed the Employer to readvertise after the issuance of the NOF. Procedures followed by the L.A. Times prior to that date are irrelevant.

[3] We further note that previous determinations by the CO have no precedential value and, therefore, are not relevant to this discussion. See *Tedmar's Oak Factory*, 89-INA-62 (Feb. 26, 1990).

[4] See also, Ronald J. O'Mara, 96-INA-113 (December 11, 1997) (*en banc*).

favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.